Supreme Court, U.S.
FILED

(1) 93172 1 MAR 14 1994

OFFICE OF THE CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH,

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, Local 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, GREG FISHER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by United States District Judge Daniel B. Sparr, as to call for an exercise of the Supreme Court's power of supervision.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John Casillan and his attorney, David L. Smith, hereby petition the Supreme Court of the United States to issue a writ of certiorari to review the orders and judgments entered in this case by the United States Court of Appeals for

the Tenth Circuit on January 15, 1993 and December 14, 1993.

OPINIONS BELOW

Reference is hereby made to the official and unofficial reports of the opinions delivered in this case by the Tenth Circuit. These reports are in the form of unpublished orders and judgments, which under 10th Cir. R. 36.3 have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel, and which are included in the appendix to this petition at pages 1a-39a.

JURISDICTION

The orders and judgments sought to be reviewed were entered on January 15, 1993 and December 14, 1993. 28 U.S.C. §

1254 is the statutory provision believed to confer on the Supreme Court jurisdiction to review these orders and judgments by writ of certiorari. Rehearing en banc of the January 15, 1993 order and judgment was denied by the Tenth Circuit on February 17, 1993. No petition for rehearing was filed with respect to the December 14, 1993 order and judgment.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

Mr. Casillan is an Hispanic/Filipino citizen of the United States who was employed by the Regional Transportation District ("RTD") in Denver, Colorado from November 24, 1974 to November 10, 1989.

On November 6, 1989, Mr. Casillan filed a charge of national origin discrimination against his employer with the United States Equal Employment Opportunity Commission because of a September 12, 1989 incident in which a supervisor by the name of George Stanko falsely accused him of attempting to run down a co-employee in a golf cart. Mr. Stanko and another RTD official, Greg Fisher, suspended Mr. Casillan from his employment and told him never to set foot on RTD property again until he had been examined by a psychiatrist and cleared to return to work. When Mr. Casillan refused to submit to a psychiatric examination, Mr. Fisher terminated him from his employment without first giving him a due process hearing or otherwise following RTD's termination policies and procedures. The acting general manager

of RTD, Richard D. Bauman, and other high-ranking RTD officials subsequently ratified and finalized Mr. Fisher's actions. Amalgamated Transit Union, Local 1001 ("ATU") filed a grievance on Mr. Casillan's behalf, but failed or refused to adequately represent Mr. Casillan in the subsequent grievance and arbitration proceedings. On July 3, 1990, the arbitrator issued a decision rubber-stamping the unconstitutional actions by the RTD and its officials.

On September 27, 1990, Mr. Casillan filed suit in the United States District Court for the District of Colorado charging a conspiracy by and among the RTD, the ATU, and six RTD officials (hereinafter collectively referred to as "respondents") to deprive him of his civil rights under 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act

of 1964, 42 U.S.C. §§ 2000e et seq.; § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.[1] After denying Mr. Casillan's motion to disqualify ATU's attorneys from the case because of a conflict of interest created by their prior representation of him in his grievance and arbitration proceedings, United States District Judge Daniel B. Sparr granted respondents' motions to dismiss and/or for summary judgment and dismissed Mr. Casillan's conspiracy case, but failed to lift the stay on discovery that had been in effect since February 6,

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[1]Jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1343.

1991.[2] Judge Sparr subsequently imposed monetary sanctions of $438.13 against Mr. Casillan's attorney for filing alleged frivolous motions for reconsideration of rulings made by United States Magistrate Judge Hilbert Schauer, but failed to address the merits of Mr. Casillan's

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[2]At a telephone discovery conference on January 29, 1991, Judge Sparr promised Mr. Casillan's attorney that there would be no ruling on respondents' motions to dismiss and/or for summary judgment until there had been an adequate opportunity for discovery. After Judge Sparr subsequently stayed all discovery in the case pending determination of respondents' motions to dismiss and/or for summary judgment, Mr. Casillan filed an affidavit pursuant to Fed. R. Civ. P. 56(f) stating that essential facts were exclusively in the knowledge and control of the respondents; that since discovery had been stayed, he would be unable to present by affidavit facts essential to justify his opposition to respondents' motions to dismiss and/or for summary judgment; and that additional time would be necessary for him to take depositions and conduct other discovery regarding the conspiracy to deprive him of his civil rights. Mr. Casillan's Rule 56(f) affidavit was stricken from the record.

attorney's arguments opposing the imposition of monetary sanctions against him.[3]

On appeal, the Tenth Circuit affirmed Judge Sparr's orders, but failed to address the merits of Mr. Casillan's and his attorney's arguments opposing dismissal of Mr. Casillan's conspiracy case and the imposition of monetary sanctions against Mr. Casillan's

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[3]On August 30, 1991, Magistrate Judge Schauer denied RTD's motion for a protective order on procedural grounds, but refused to address Mr. Casillan's and his attorney's motion to strike the false and defamatory statements made by RTD, its legal counsel (Sally Zack Wheeler), and others in their motion for protective order and supporting affidavits. After Mr. Casillan filed with Judge Sparr a motion for reconsideration of Magistrate Judge Schauer's ruling on this matter, Magistrate Judge Schauer purported to deny the motion for reconsideration and to impose monetary sanctions against Mr. Casillan's attorney for filing an alleged frivolous motion for reconsideration.

attorney.[4] The Tenth Circuit imposed additional monetary sanctions against Mr.

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[4]On appeal, Mr. Casillan argued that Judge Sparr erred in concluding that the allegations made in Mr. Casillan's second amended complaint failed to state claims upon which relief can be granted; that Judge Sparr denied him the opportunity to determine through the discovery process whether the evidence existed to establish a conspiracy; that Judge Sparr erred in denying his motion to disqualify ATU's attorneys; that Judge Sparr erred in dismissing his second amended complaint without addressing the arguments made in his motions for reconsideration of Magistrate Judge Schauer's August 30, 1991 and November 29, 1991 orders; and that Judge Sparr erred in denying his motion for reconsideration of Judge Sparr's April 5, 1991 order striking his Rule 56(f) affidavit. Mr. Casillan's attorney argued that Judge Sparr abused his discretion by imposing monetary sanctions against him without addressing the arguments made in Mr. Casillan's motions for reconsideration of Magistrate Judge Schauer's August 30, 1991 and November 29, 1991 orders, and without addressing the arguments made in Mr. Casillan's attorney's objection to the "authenticity or reasonableness" of the monetary sanctions imposed against him by Magistrate Judge Schauer in Magistrate Judge Schauer's November 29, 1991 order. Jurisdiction of the Tenth Circuit in both appeals was based on 28 U.S.C. § 1291.

Casillan's attorney for filing and pursuing alleged frivolous appeals of Judge Sparr's orders, but failed to give Mr. Casillan's attorney notice that sanctions were being considered or a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed.[5] The case was then remanded to Judge Sparr "for a determination of reasonable attorney fees for each

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[5]The respondents failed to request the Tenth Circuit to impose attorney fees and costs against Mr. Casillan's attorney for filing and pursuing an alleged frivolous appeal of Judge Sparr's dismissal of Mr. Casillan's case. Furthermore, prior to imposing monetary sanctions, the Tenth Circuit failed to issue an order to show cause why sanctions should not be imposed against Mr. Casillan's attorney for filing and pursuing alleged frivolous appeals of Judge Sparr's orders, and failed to provide Mr. Casillan's attorney with a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed. Mr. Casillan's attorney was therefore deprived of his due process rights.

defendant for defending this appeal." Mr. Casillan's and his attorney's motions to disqualify the Tenth Circuit hearing panel on the ground of judicial bias and for rehearing en banc were denied.[6]

On remand, Judge Sparr determined that attorney fees of $14,481.50 were reasonable for defending Mr. Casillan's and his attorney's appeals to the Tenth Circuit, and assessed this amount against

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[6]In his motion to disqualify, Mr. Casillan argued that the facts of the case had been misstated; that the transcript of the evidentiary hearing held before Magistrate Judge Schauer on February 13, 1991 had been ignored; that there had been a refusal to exercise supervisory authority over Judge Sparr's illegal actions; and that there had been an abuse of discretion by ruling that Mr. Casillan's attorney's arguments in support of his contentions on the rulings relating to Mr. Casillan's motions for reconsideration were frivolous. Mr. Casillan argued that under these circumstances, the impartiality of the Tenth Circuit hearing panel that rendered the opinion might reasonably be questioned under 28 U.S.C. § 455(a).

Mr. Casillan's attorney and in favor of respondents' attorneys, but failed to address the merits of Mr. Casillan's attorney's arguments opposing the proposed monetary sanctions.[7] Despite the fact that Mr. Casillan's attorney advised Judge Sparr that he was financially unable to pay monetary sanctions or to post a cost bond, he was ordered to post a cost bond of $1,150.00 pending appeal to the Tenth Circuit, and was ordered to show cause why he should

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[7]In addition to denying Mr. Casillan's and his attorney's motion to disqualify Judge Sparr from the case pursuant to 28 U.S.C. § 455(a), Judge Sparr denied their motion for monetary sanctions against respondents' attorneys for requesting attorney fees and costs for defending Mr. Casillan's case in the District Court. Since the case was remanded to Judge Sparr "for a determination of reasonable attorney fees for each defendant for defending this appeal," these requests clearly violated the mandate of the Tenth Circuit's January 15, 1993 order and judgment.

not be held in contempt for failing to obey the order to pay attorney fees of $14,481.50 to respondents' attorneys. This contempt proceeding is still pending before Judge Sparr.

On December 14, 1993, the Tenth Circuit affirmed Judge Sparr's assessment of attorney fees of $14,481.50 against Mr. Casillan's attorney, but failed to address the merits of Mr. Casillan's attorney's arguments opposing the imposition of monetary sanctions against him. The Tenth Circuit considered the fact that "Mr. Smith has been sanctioned in the past and is currently the subject of a stringent disciplinary order issued by another panel of this court," but failed to explain why Mr. Casillan's

attorney is being subjected to double punishment for the same conduct.[8]

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[8]The referenced disciplinary order was issued by a three-judge disciplinary panel of the Tenth Circuit on November 29, 1993, and suspended Mr. Casillan's attorney from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit or the District Court are paid. In re Smith, 10 F.3d 723 (10th Cir. 1993). Mr. Casillan's attorney may apply for reinstatement to the Tenth Circuit Bar "when he can demonstrate that each sanction order of this court or the district court has been satisfied." Id. At the present time, more than $50,000.00 in monetary sanctions have been imposed against Mr. Casillan's attorney by the Tenth Circuit and the District Court, and investigations or proceedings for reciprocal discipline have been begun by the United States Court of Appeals for the Federal Circuit, the United States District Court for the District of Colorado and the Colorado Supreme Court.

As grounds for indefinitely suspending Mr. Casillan's attorney from the practice of law in the Tenth Circuit, the disciplinary panel found and concluded that he had filed "frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381

(10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993) (No. 92-1994) and . . . in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993)." Id. However, the disciplinary panel refused to examine the issue of whether the appeals in the referenced cases were frivolous, stating that "[w]e are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court," citing "United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990)." The disciplinary panel thus ignored 10th Cir. R. 36.3, which states that unpublished orders and judgments have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel.

Before indefinitely suspending Mr. Casillan's attorney from the practice of law in the Tenth Circuit, the disciplinary panel denied his request pursuant to Section 7 of the Plan for Attorney Disciplinary Enforcement of the United States Court of Appeals for the Tenth Circuit to be heard in person in defense and in mitigation with respect to

the charges being brought against him by the disciplinary panel. In that request, Mr. Casillan's attorney said:

> Since [Mr. Smith's] case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony, . . . [Mr. Smith] requests the Disciplinary Panel to vacate the hearing and oral argument set for November 12, 1993, and to hold an evidentiary hearing [emphasis in the original] at some future date after . . . [Mr. Smith] has been given the opportunity to prepare his case. Alternatively, . . .[Mr. Smith] requests the Panel to designate a special master for purposes of conducting an evidentiary hearing.

As the result of the disciplinary panel's denial of an evidentiary hearing to Mr. Casillan's attorney after a reasonable opportunity to prepare his case, he was unable to present expert testimony or otherwise make a proper record on the issue of whether the appeals in the referenced cases were frivolous, and was unable to present the financial information necessary to show that he is financially unable to pay more than $50,000.00 in sanctions imposed against him by the Tenth Circuit and the District Court.

The disciplinary panel's suspension order is the subject of a separate

ARGUMENT

On the basis of the foregoing statement of the case, Mr. Casillan was illegally deprived of an opportunity for discovery before Judge Sparr dismissed his suit charging a conspiracy to deprive him of his civil rights. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

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petition for a writ of certiorari filed with the Supreme Court on March 31, 1994, arguing that an attorney may not be disciplined by a circuit court based on the attorney's challenge to that circuit court's view of its interlocutory jurisdiction which is in conflict with that of other circuits; that an attorney may not be suspended by a circuit court until the attorney pays all monetary sanctions assessed against him or her, where the attorney is financially unable to pay those sanctions; and that a circuit court's denial of an evidentiary hearing prior to suspending an attorney constitutes an abuse of discretion or a denial of due process. Since this petition and the petition in the present case are based on many of the same facts and arguments, and request much of the same relief, Mr. Casillan and his attorney request consolidation of the petitions for all purposes.

S.Ct. 2505, 91 L.Ed.2d 202 (1986);[9] Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979).[10] Mr. Casillan's attorney

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[9]In Anderson, the Supreme Court said:

> This requirement [i.e., the requirement that when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial'"] in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

Id. at 477 U.S. at 250 n. 5, 106 S.Ct. at 2511 n. 5, 91 L.Ed.2d at 213 n. 5.

[10]In Lessman, the Tenth Circuit said:

> In many cases of conspiracy essential information can only be produced through discovery, and the parties should not be thrown out of court before being given an opportunity through that process to ascertain whether the linkage they think may exist actually does.

was deprived of his due process rights to notice that sanctions were being considered and a reasonable opportunity to file a brief or otherwise be heard before sanctions were imposed against him. Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).[11] Judge Sparr and the

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Id. at 611-12.

[11]In Braley, the Tenth Circuit said:

> But the determination to impose sanctions on an attorney for bringing a frivolous appeal involves another step--placing the blame. And there remains for consideration the defenses which might absolve the lawyer of the responsibility for taking the frivolous appeal. This, we hold, justifies and requires notice and opportunity to be heard before final judgment. At this point the court has two options: to decide the matter itself or to remand to allow the district court to resolve the entire issue. An argument in favor of remand is that a hearing generally will be necessary to determine the amount of the costs to be paid, and trial courts are better equipped for hearing conflicting evidence. But

usually the appellate court that made the frivolousness determination will want to hear for itself the excuses, if any, offered by the lawyer to avoid or to mitigate the sanctions. In such a case, if a party has already made a motion or request in its brief that sanctions be imposed, and identified the party or counsel it wants to be sanctioned, the notice requirements are satisfied, so long as the court gives the person against whom sanctions are requested an opportunity to file a brief or otherwise be heard before imposing sanctions. See, e.g., Herzfeld, 769 F.2d at 647. On those occasions when the court intends to consider such sanctions sua sponte, due process is satisfied by issuance of an order to show cause why a sanction should not be imposed and by providing a reasonable opportunity for filing a response. See Van Sickle v. Holloway, 791 F.2d 1431, 1437 (10th Cir. 1986); see also Reliance, 792 F.2d at 1139; cf. 10th Cir. 46.5.2 (specifying procedure for imposition of monetary sanctions on court-appointed counsel).

At the appellate level, the right to respond does not require an adversarial, evidentiary hearing. See, e.g., Tatum v. Regents of the University of Nebraska-Lincoln, 460 U.S. 1048, 103 S.Ct. 1450, 75

L.Ed.2d 804, 462 U.S. 1117, 103 S.Ct. 3084, 77 L.Ed.2d 1346 (1983); see generally Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 Duke L.J. 845, 875-77. Even at the trial court level, the sanction inquiry may properly be limited to the record in most instances. See Fed. R. Civ. P. 11 Advisory Committee Note, 97 F.R.D. 198, 200-01 (1983). If the court has acted sua sponte, the prevailing party should be notified that it may, but need not, participate in the proceedings to determine whether sanctions should be imposed.

After considering any excuses the attorney offers to justify his or her actions, the court generally will enter a final order rejecting or imposing sanctions and, if imposing, either establish the amount itself or remand to the district court for that determination. If fact issues arise from the response, affecting either the amount or whether sanctions should be imposed at all, the appellate court may delegate to the district court the task of resolving those issues. Although the panel in the case before us intended to allow the district court to lift sanctions entirely if the district court found that justified, the order did not make that clear. The panel order appears to impose sanctions sua sponte without giving Alexander

Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney without addressing his arguments opposing the dismissal of Mr. Casillan's conspiracy case and the imposition of monetary sanctions against him. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).[12] Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's

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> notice and an opportunity to respond.

Id. at 1514-15.

[12]In Cooter & Gell, the Supreme Court said:

> [A]n appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination. A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

Id. at 110 S.Ct. 2461.

attorney for filing motions for reconsideration of Magistrate Judge Schauer's rulings to Judge Sparr that he was required to file in order to preserve Mr. Casillan's right to appeal these rulings to the Tenth Circuit. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); Moore v. United States, 950 F.2d 656 (10th Cir. 1991); Boyd Motors, Inc. v. Employers Ins., 880 F.2d 270 (10th Cir. 1989); Niehaus v. Kansas Bar Ass'n, 793 F.2d 1159 (10th Cir. 1986). Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney for filing appeals of Judge Sparr's orders that presented colorable claims based on the facts and law at issue and were therefore not frivolous. White v. General Motors Corp., Inc., 908 F.2d 675

(10th Cir. 1990).[13] Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney for conduct that manifested neither an

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[13]In White, the Tenth Circuit said:

> This circuit has adopted the view that an attorney's actions must be objectively reasonable in order to avoid Rule 11 sanctions. Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988). A good faith belief in the merit of an argument is not sufficient; the attorney's belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances. Id. In addition, it is not sufficient for an offending attorney to allege that a competent attorney could have made a colorable claim based on the facts and law at issue; the offending attorney must actually present a colorable claim. See Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1470 (2d Cir. 1988)(focus on whether an objectively reasonable basis for claim 'was demonstrated') rev'd in part on other grounds ___ U.S. ___, 110 S.Ct. 456, 107 L.Ed.2d 438 (1988).

Id. at 680.

intentional nor a reckless disregard of his duties to Judge Sparr or the Tenth Circuit.[14] Judge Sparr and the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney in an amount greatly in excess of the minimum that would adequately serve to deter any undesirable behavior.[15] Judge Sparr and

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[14]In Braley, the Tenth Circuit said:

> We believe the proper standard under either Rule 38 or § 1927 is that excess costs, expenses, or attorney's fees are imposable against an attorney personally for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court.

Id. at 1512.

[15]In White, the Tenth Circuit said:

> We believe that a district court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed:

. . .

> 2. Minimum to deter. As we have already stated, the primary purpose of sanctions is to deter attorney and litigant misconduct, not to compensate the opposing party for its costs in defending a frivolous suit. It is particularly inappropriate to use sanctions as a means of driving certain attorneys out of practice. Such decisions are properly made by those charged with handling attorney disbarment and are generally accompanied by specific due process provisions to protect the rights of the attorney in question. Doering, 857 F.2d at 196 & n. 4. We agree with the Third Circuit that the amount of sanctions is appropriate only when it is the "minimum that will serve to adequately deter the undesirable behavior." Id. at 194 (quoting Eastway, 637 F.Supp. at 565) (emphasis in Circuit opinion); see also Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.J. 901, 912-14 (1988) (stressing importance of optimal rather than maximum deterrence in the imposition of Rule 11 sanctions). Thus, the limit of any sanction award should be that amount reasonably necessary to deter the wrongdoer. E.g., Doering, 857 F.2d at 195-96.

Id. at 684.

the Tenth Circuit imposed monetary sanctions against Mr. Casillan's attorney in an amount that creates a substantial risk of chilling federal civil rights litigation.[16] Judge Sparr and the Tenth

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[16]In White, the Tenth Circuit said:

> We believe that a district court must expressly consider at least the following circumstances when determining the monetary sanctions appropriate in a given case, all of which serve as limitations on the amount assessed:
>
> . . .
>
> 4. Other factors. In addition, the court may consider factors [in assessing sanctions] such as the offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved, and other factors as deemed appropriate in individual circumstances. See ABA Standards at 236-37.

Id. at 685.

Circuit imposed monetary sanctions against Mr. Casillan's attorney without making specific findings regarding who bears the fault, if any, for the various actions alleged to warrant sanctions.[17] Judge Sparr and the Tenth Circuit imposed

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[17]In White, the Tenth Circuit said:

> Sanctions must be appropriate in amount and levied upon the person responsible for the violation. Chevron, U.S.A., Inc. v. Hand, 763 F.2d 1184, 1187 (10th Cir. 1985). We agree with those circuits that have expressed the view that the sanctioning of a party requires specific findings that the party was aware of the wrongdoing. Calloway, 854 F.2d at 1474-75; Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc). In the instant case, the trial court appears to have assessed joint and several liability without considering relative fault. . . . Therefore, on remand the court should make more specific findings regarding who bears the fault for the various actions warranting sanctions.

Id. at 685.

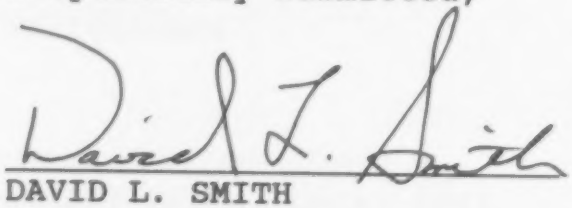
monetary sanctions against Mr. Casillan's attorney in an amount that he is financially unable to pay. The Tenth Circuit subjected Mr. Casillan's attorney to double punishment for the same conduct by suspending him from the practice of law in the Tenth Circuit until all sanctions imposed against him by the Tenth Circuit and the District Court are paid. Under all the circumstances of the case, Judge Sparr's and the Tenth Circuit hearing panel's impartiality might reasonably be questioned, and they therefore abused their discretion by refusing to disqualify themselves from the case pursuant to 28 U.S.C. § 455(a).

CONCLUSION

The United States Court of Appeals for the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned

such a departure by United States District Judge Daniel B. Sparr, as to call for an exercise of the Supreme Court's power of supervision.

Respectfully submitted,



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(303) 534-0153

ATTORNEY FOR PETITIONERS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

JOHN CASILLAN,
DAVID L. SMITH

Petitioners,

v.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, Local 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, GREG FISHER,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ATTORNEY FOR PETITIONER

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
No. 93-1158
(D.C. No. 90-S-1722)
(D. Colo.)

JOHN CASILLAN,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT; AMALGAMATED TRANSIT UNION, LOCAL 1001; MICHAEL GARCIA; RICHARD BAUMAN; ROBERT GARSIDE; ED RHATICAN; PETE PEREA; BERNIE SNYDER; GEORGE STANKO, and GREGG FISHER,

Defendants-Appellees.

DAVID L. SMITH,

Attorney-Appellant.

ORDER AND JUDGMENT*

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Before ANDERSON and EBEL, Circuit Judges, and WINDER,** District Judge.

**Honorable David K. Winder, Chief Judge, United States District Court for the District of Utah, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

This proceeding arises out of an unsuccessful civil rights action litigated by appellant David L. Smith as counsel for plaintiff John Casillan. On two prior appeals, this court affirmed the district court's dismissal of the action and its imposition of sanctions. An en banc petition for rehearing and

motion to disqualify the author of the adverse order and judgment were also denied. As a sanction for pursuing the frivolous appeals, this court held plaintiff's counsel accountable for attorneys' fees incurred by the opposing parties, and remanded the matter to the district court for a determination of the appropriate amount. On remand, the district court awarded $4,525.00, $3,269.00 and $6,687.50 to the attorneys representing three sets of defendants-appellees. This appeal followed.

Having reviewed the briefs and materials submitted by the parties, we conclude that most of the issues raised by Mr. Smith are plainly lacking in merit and warrant no further comment. The remaining matters consist of conclusory challenges to the hours and hourly rate deemed reasonable by the district court

for computing defense counsel's fees. We review the latter solely for an abuse of discretion, Aguinaga v. United Food & Commercial Workers International Union, 993 F.2d 1480, 1481 (10th Cir. 1993), of which we find no indication here.

Appellees have requested the imposition of an appellate sanction against Mr. Smith for pursing a frivolous appeal. Unlike a number of other matters brought before this court by Mr. Smith,[1] this appeal, while meritless, is not in our opinion so bereft of legal or factual bases as to warrant sanctions.

The order of the United States District Court for the District of Colorado is AFFIRMED. Amalgamated

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[1] We note that Mr. Smith has been sanctioned in the past and is currently the subject of a stringent disciplinary order issued by another panel of this court.

Transit Union's motion to adopt the answer brief filed by its co-appellees is GRANTED, and the Regional Transportation District's motions to supplement its supplemental appendix with a full hearing transcript and to compel Mr. Smith to order and pay for the same is DENIED as moot in light of our disposition of the appeal.

Entered for the Court

Stephen H. Anderson
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT
Nos. 92-1009 and 92-1039
(D.C. No. 90-S-1722)
(Dist. Colo.)

JOHN CASILLAN,

Plaintiff-Appellant,

v.

REGIONAL TRANSPORTATION DISTRICT; AMALGAMATED TRANSIT UNION, Local 1001; MICHAEL GARCIA; RICHARD BAUMAN; ROBERT GARSIDE; ED RHATICAN; PETE PEREA; BERNIE SNYDER; GEORGE STANKO, and GREGG FISHER,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before McKAY, SETH and MOORE, Circuit Judges

---

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(e); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiff John Casillan appeals the district court's dismissal of his civil rights complaint against the Regional Transportation District (RTD), Amalgamated Transit Union (ATU), and various named individual defendants. In a separate case, plaintiff's counsel also appeals the imposition of sanctions against him. We combine both cases for disposition and affirm.

This case arises out of a series of work-related conflicts between plaintiff, three of his four co-workers and

defendant Stanko, which resulted in plaintiff's termination for refusal to undergo psychiatric evaluation. Plaintiff is a United States citizen of Hispanic/Filipino origin. He was employed as a facilities maintenance technician by defendant RTD for fifteen years, spanning from November 24, 1974, until his termination on November 10, 1989. At the time of his termination, plaintiff and his co-workers were supervised by defendant Stanko.

The ongoing tension between plaintiff and three co-workers, which included a fist fight between plaintiff and a co-worker in 1987, and an alleged attempt by plaintiff to run over another coworker with a golf cart on September 12, 1989, are extensively documented in an arbitrator's decision made a part of the record before us. Because of the

golf cart incident, plaintiff was suspended for two days and issued disciplinary notices for conduct unbecoming an employee and use or threat of force. According to defendant Stanko, when plaintiff was suspended, plaintiff made inappropriate comments about Mr. Stanko's health and threatened to have him fired. Plaintiff subsequently asked for a medical pass and not return to work until October 16, 1989.[1]

Between October 16 and 19, plaintiff allegedly threatened to "get" one of his co-workers, accused defendant Stanko of setting him up, and attempted to frighten another co-worker by driving his van toward the man. On October 19, 1989, the

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[1] During his time off, plaintiff maintains he filed complaints with the EEOC and Colorado Civil Rights Commission, alleging national origin discrimination. The existence and/or outcome of these complaints is unknown.

three co-workers told defendant Stanko they were unwilling to work with plaintiff because they were afraid for their own safety, given plaintiff's hostile actions and their on-the-job exposure to high voltage. Defendant Stanko sent the men back to work and contacted defendant Fisher, the senior labor relations representative.

After meeting with plaintiff, defendant Stanko, plaintiff's co-workers, and others, defendant Fisher asked plaintiff to undergo a psychiatric evaluation. Plaintiff refused. Mr. Fisher then sent plaintiff home on paid sick leave pending psychiatric evaluation and threatened to terminate plaintiff's sick leave benefits if plaintiff failed to undergo evaluation.

Plaintiff's sick leave benefits expired on October 24 but were extended

through November 10 by defendant Fisher, who again asked plaintiff to reconsider psychiatric evaluation. On November 6, plaintiff filed a national origin discrimination complaint with the EEOC, alleging he had been falsely accused (by defendant Stanko) of attempting to run down a co-worker in a golf cart.[2]

On November 8, defendant Fisher informed plaintiff he would be terminated if he continued to refuse evaluation. Plaintiff was terminated on November 10 due to "continuing voluntary unavailability for work" and given full benefits and pay through that date.

Because plaintiff was a member of defendant ATU and his employment was governed by a collective bargaining

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[2] Once again, the outcome of the EEOC complaint is unknown.

agreement between ATU and RTD, plaintiff first challenged his termination in a grievance/arbitration proceeding in which he was represented by defendant ATU. At the July 1990 arbitration hearing, plaintiff testified at length about the harassment he allegedly had experienced at the hands of his co-workers. Plaintiff claimed his co-workers instigated the various encounters and conflicts at issue. Plaintiff also accused defendant Stanko of singling him out for less desirable jobs. Finally, plaintiff testified he had filed EEOC charges on a number of occasions.

In response, RTD contended it had the right to require plaintiff to undergo psychiatric evaluation under the Management Rights and Sick Leave provisions of the Collective Bargaining Agreement. RTD also introduced evidence

about its past practice of requiring medical or psychiatric evaluations where warranted, noting that defendant ATU (which at that time represented plaintiff) could select a second doctor if it disagreed with the results of the initial psychiatric exam. In the alternative, RTD suggested plaintiff could be evaluated under the Employee Assistance Program, a program for employees who represent less of an immediate threat.

The arbitrator concluded plaintiff's termination differed "dramatically" from a normal discharge case in two important respects. First, plaintiff's termination, in effect constituted an indefinite suspension because RTD had agreed to put plaintiff back to work at the facility of his choice if plaintiff agreed to a psychiatric evaluation and

the results were favorable. Second, RTD had a contractual right to require plaintiff to undergo medical examination, (including psychiatric evaluation, which the arbitrator found indistinguishable from physical examination) based on the provisions of the collective bargaining agreement and past practice. The arbitrator determined RTD had a reasonable basis for requiring the evaluation, given the number of complaints against plaintiff and RTD's need to take action to solve the obvious problems between plaintiff and his co-workers. Finding he could "only commend" RTD for the manner in which it handled plaintiff's case, the arbitrator ordered ATU and RTD to establish an "appropriate method" for psychiatric evaluation.

Despite the arbitrator's findings, plaintiff never submitted to psychiatric

evaluation. Instead, on September 27, 1990, plaintiff filed the instant action against RTD, ATU, and several individual defendants,[3] alleging violation of his civil rights under 42 U.S.C. § 1981 and 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000; § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. On December 10, 1991, after more than a year of procedural skirmishes and two ineffectual amendments to plaintiff's original complaint, the district court

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[3] In addition to defendants Stanko and Fisher, plaintiff sued six members of RTD management. With the exception of defendant Bauman, who was RTD acting general manager when plaintiff was terminated, it is unclear from plaintiff's complaint or the briefs submitted on appeal exactly what positions the other named defendants held or in what capacity they were acting when they allegedly violated plaintiff's civil rights.

granted defendants' Fed. R. Civ. P. 12(b)(6) motions to dismiss plaintiff's complaint for failure to state claims upon which relief could be granted.

Plaintiff argues that under Lessman v. McCormick, 591 F.2d 605, 611 (10th Cir. 1979) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)), "and the legal authorities cited therein, "he is not required to set out in detail the facts upon which he bases his claim." To the contrary, plaintiff maintains his "short and plain, statement of claims gave defendants fair notice of the basis for charges against them, thus satisfying Lessman's loose pleading requirements. Plaintiff argues the district court erred in concluding otherwise or, alternately, in not giving him the opportunity to amend the complaint again under Fed. R. Civ. P. 15(a).

The sufficiency of a complaint is a question of law which this court reviews de novo, applying the same scrutiny, as the trial court. Ayala v. Joy Mfg., Co., 877 F.2d 846, 847 (10th Cir. 1989) (quoting Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir. 1986) (citations omitted)). Thus, in considering whether the district court erred in dismissing plaintiff's complaint, "[all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984) (citation omitted) (emphasis added). Dismissal is proper "only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief." Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d

1111, 1115 (10th Cir. 1991) (citation omitted).

Plaintiff's reliance upon Lessman is misplaced because the case is distinguishable in two important respects. First, though the complaint in Lessman failed to allege plaintiff "was unlawfully deprived of her money or property," the complaint did state specific facts supporting a claim of false arrest and false imprisonment under color of state law. Lessman, 591 F.2d at 609. Second, Lessman's false imprisonment claim, which asserted a violation of the constitutional right to be free from bodily restraint, is a recognized § 1983 cause of action.

In contrast, Mr. Casillan's complaint is devoid of any facts from which this court could surmise that a constitutionally protected liberty or

property right was violated. Based upon plaintiff's refusal to submit to psychiatric examination, the complaint identifies only the "reasonable expectation of privacy with respect to his own thoughts and mental processes" as a constitutional predicate for his action.

Plaintiff has cited no cases in which such a right is recognized, especially where an employment agreement specifically grants an employer the right to request such an examination. Here, the contract governing plaintiff's employment explicitly stated, "the Employer [RTD] reserves the right to request that the employee submit to an examination by a medical doctor of the Employer's choosing and at the Employer's expense."

Plaintiff's complaint, moreover, is full of unsubstantiated, generalized

factual allegations which do not give defendants any notice of the grounds upon which plaintiff's claims are based. The most glaring example is plaintiff's repeated charge that defendant ATU "aided, abetted and participated in" the deprivation of his constitutional rights. Nowhere does the complaint state what specific actions defendant ATU supposedly took to deprive plaintiff of constitutionally protected rights. Only in plaintiff's appeal brief do we discover that defendant ATU allegedly "failed to adequately represent him in the grievance and arbitration process." This contention was not raised in the district court. In short, plaintiff has confused vague conclusory generalizations for the statement of facts necessary to state a claim.

As the district court noted in its comprehensive, wellreasoned order dismissing plaintiff's complaint, all the claims contained in the complaint are disposable due to their legal inadequacy. For instance, plaintiff's § 1983 claim fails to satisfy either of the statute's two elements because the complaint does not explain how defendants acted under color of law or which of plaintiff's constitutionally protected rights were violated. Because the elements of a conspiracy claim under § 1983 are the same as those for a regular § 1983 claim, Norton v. Liddel, 620 F.2d 1375, 1378-79 (10th Cir. 1980), plaintiff's § 1983 conspiracy claim is plagued by the same problems. Plaintiff's § 1981 claim is without merit because § 1981 does not apply to the kind of on-the-job

deprivation which plaintiff alleges.[4] Plaintiff's Title VII claim also fails because plaintiff alleges no facts to support a causal connection between his EEOC claims and his termination or retaliatory motives on the part of named defendants. Finally, plaintiff's privacy, property, and liberty claims under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments are not

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[4] As the Supreme Court noted in Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989), "the right to make contracts [under § 1981] does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including . . . imposition of discriminatory working conditions" or harassment by a supervisor. Nor does the right to enforce contracts "extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights." Id. at 177-78. Here, the arbitration hearing and instant case illustrate that no defendant has impaired plaintiff's right of access to legal process."

actionable because the complaint fails to state specific constitutional rights which were violated or factual support for those claims. The one right enumerated by plaintiff, the "reasonable expectation of privacy with respect to his own thoughts and mental processes," is not of constitutional import.[5]

Thus, although "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim,"[6] clearly the presumption is not without limits.

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[5] "The constitutional right of privacy is not to be equated with the common law right recognized by state tort law . . . . [O]nly the most intimate phases of personal life have been held to be constitutionally protected." McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir.), cert. denied, 429 U.S. 855 (1976) (citations omitted).

[6] Morgan, 792 F.2d at 978 (quoting Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985)).

As we stated in Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977) (citations omitted), "allegations of conclusions or of opinions are not sufficient when no facts are alleged by way of the statement of the claim."

Plaintiff had three opportunities to file a complaint containing facts sufficient to support his claims. Each of his amended complaints, however, was virtually identical to the original complaint -- devoid of sufficient facts and overly replete with conclusory allegations. Under Fed. R. Civ. P. 15(a), plaintiff was entitled to amend his complaint "once as a matter of course." The district court generously allowed plaintiff to amend a second time, but plaintiff failed to take advantage of the opportunity to tighten his legal

arguments or present facts supporting his claims. Allowing plaintiff to amend yet again would serve no legitimate purpose.

Plaintiff claims the district court's failure to lift a stay of discovery[7] before dismissing his complaint deprived him of "the opportunity to determine through the discovery process whether the evidence existed to establish a conspiracy." To support his argument, plaintiff again cites Lessman, 591 F.2d at 611, this time for the proposition that "parties should not be thrown out of court before being given an opportunity through . . . [discovery] to ascertain whether the linkage they think may exist actually does."

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[7] Discovery was stayed on March 29, 1991, pending evidentiary hearing on and resolution of plaintiff's motion to disqualify defendant ATU's counsel.

As a general rule, "[d]iscovery rulings are within the broad discretion of the trial court." Willner v. Budig, 848 F.2d 1032, 1035-36 (10th Cir. 1988), cert. denied, 488 U.S. 1031 (1989) (citation omitted); Sil-Flo, Inc. v. SFHC, Inc., 917 F.2d 1507, 1514 (10th Cir. 1990) (citation omitted). "[A] trial court's decision [on discovery matters] will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." United States v. Ortiz, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986).

Plaintiff's conspiracy claim fails to state the specific conspiratorial actions allegedly taken by defendants or the particular constitutional rights allegedly violated by those actions.

Indeed, in the same conclusory fashion which plagues the entire complaint, paragraph 1 merely alleges defendants "have engaged in a conspiracy with each other and with unknown third persons for the purpose of depriving, either directly or indirectly, the Plaintiff of his rights . . . ." Paragraph 2 proceeds along a similarly vague course, only stating that "[o]ne or more persons engaged in the conspiracy did, or caused to be done, an act or acts in furtherance of the object of such conspiracy [i.e., plaintiff's termination], whereby the Plaintiff was injured in his person or property." Plaintiff does not assert what act or acts were committed or by whom, nor does he assert which

constitutional rights were violated as a consequence of concerted action.[8]

Plaintiff's reliance on Lessman for the right, to discovery is misplaced for two reasons. First, Lessman involved conspiracy charges under § 1985, not § 1983. Arguably, Lessman's observation regarding the need for discovery in conspiracy cases[9] is confined to § 1985 conspiracy claims, given that statute's stringent intent/motive requirement.

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[8] Moreover, any such claim could not lie against either RTD or ATU because the doctrine of respondeat superior does not apply to § 1983 claims. Monell v. Dept. of Social Servs., 436 U.S. 658, 691 (1978). "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694.

[9] Specifically, Lessman, 591 F.2d at 611, stated that "[i]n many cases of conspiracy essential information can only be produced through discovery."

Second, Lessman does not mandate discovery whenever a plaintiff alleges conspiracy. Indeed, in Lessman we affirmed the dismissal of the plaintiff's conspiracy claim, finding the plaintiff failed to show she was the object of a class-based invidiously discriminatory animus." Id. at 608.

Thus, although plaintiff claims he should have been allowed to conduct discovery and proceed with his conspiracy claim, he was not entitled to discovery as a matter of law before the district court ruled on defendants, motions to dismiss. One need only examine plaintiff's fact-less complaint to understand the uselessness of further discovery. The district court's dismissal of plaintiff's complaint without discovery was entirely appropriate.

These conclusions render moot the remaining issues raised in Case 92-1009. We have, nonetheless, reviewed those issues and find them frivolous. Disqualification of ATU's counsel was not required because counsel had no previous attorney-client relationship with plaintiff. Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986). The district court did not err by dismissing the complaint without ruling on plaintiff's motions for reconsideration. The first motion was filed notwithstanding the court had ruled in plaintiff's favor.[10] Plaintiff's

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[10] Specifically, plaintiff's counsel argued that the magistrate's order was clearly erroneous and contrary to law because it "deprived Plaintiff's counsel of the opportunity to expunge the

(continued...)

second motion to reconsider stated the magistrate "was without legal authority" to impose sanctions because under Local Rule 602 C of the United States District Court for the District of Colorado only the district court could do so. The second motion also challenged the granting of defendant RTD's motion for protective order on the grounds that RTD "failed to meet its initial burden" of proving its personnel files were privileged and plaintiff was denied the opportunity to demonstrate the relevancy of the files to his claims. Plaintiff's third motion to reconsider challenged the district court's April 5, 1991 order striking his Rule 56(f) affidavit because he should have been allowed to respond to

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[10](...continued)
record of false and defamatory statements" allegedly made by defendant RTD and its counsel.

defendants, motions for summary judgment/dismissal under Rule 56(e) and file a Rule 56(f) affidavit. Plaintiff's arguments in support of his contentions on these rulings are frivolous.

Plaintiff argues the district court erred in adopting the order of the magistrate judge granting defendant RTD's motion for protective order and imposed sanctions against plaintiff's counsel for filing an "unwarranted and frivolous" motion to reconsider. The sanctioned motion is the first motion previously discussed in which plaintiff contended the magistrate judge's order was clearly erroneous and contrary to law, even though the magistrate judge ruled in plaintiff's favor. In the order awarding attorney fees, the magistrate judge noted that fees were justified on two grounds: "Not only did the court rule in

plaintiff's favor because it agreed with plaintiff that defendant failed to attach supporting documentation, but plaintiff has failed to cite any authority in support of his assertion that the court abused its discretion." On appeal, plaintiff again maintains the magistrate judge's order imposing fees was clearly erroneous and contrary to law and the district court erred in reinstating fees without ever ruling on the merits of plaintiff's motion for reconsideration.

In a joint answer brief, defendants argue that there was no factual basis for plaintiff's motion to reconsider. Rather, "[i]f plaintiff's counsel had reasonably investigated, he would have read the August 30, 1991 order and found it to be in his favor." Moreover, if he had reasonably investigated the law "he

would not have found any authority in support of his positions in the motion."

The standard of review for sanctions or award of attorney fees is whether the district court abused its discretion. Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992) (citations omitted); Smith v. Freeman, 921 F.2d 1120, 1122 (10th Cir. 1990) (citations omitted). Although the parties consume a significant amount of energy arguing over the propriety of sanctions, the record indicates no Federal Rule of Civil Procedure 11 sanctions were ordered. Rather, the magistrate judge's November 29, 1991 order imposing "sanctions . . . for the attorney fees required by defendants to respond to plaintiff's Motion for Reconsideration, in reality was nothing more than a mislabeled, though nonetheless justified, award of

attorney fees under Local Rule 602 C. That rule expressly states: "[p]arties seeking or responding to a reconsideration of a magistrate's order should expect that attorney fees will be awarded to the prevailing party on such review" (emphasis added).[11] Thus, Local Rule 602 C clearly authorized the magistrate judge's "sanctions."[12]

There is, however, a legitimate sanctions issue before this court. Defendant RTD asks this court to "award RTD costs and attorney fees pursuant to

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[11] Though plaintiff asks this court to strike the attorney fee provision of Local Rule 602 C, he offers no persuasive reason why this court should do so.

[12] The magistrate judge's reference to the award as "sanctions" and later inaccurate references by the parties and district court to the award as "attorney fees and costs" may have contributed to the parties' confusion over this relatively uncomplicated matter.

42 U.S.C. § 1988, Fed. R. Civ. P. 11, Fed. R. Civ. P. 56(g), as well as such other and further relief this Court deems fair and equitable." The named defendants also ask for attorney fees and costs relating to the appeal.

Under Fed. R. App. P. 38, "just damages and single or double costs" may be awarded when "an appeal is frivolous." An appeal is frivolous "if the result is obvious or if the appellant's arguments wholly lack merit." Willner, 848 F.2d at 1036. In the instant case, there are a number of grounds on which to conclude plaintiff's arguments on appeal are frivolous and to impose sanctions.

It is difficult to believe that the many legal misrepresentations and unsubstantiated, conclusory allegations contained in plaintiff's pleadings are unintentional. A typical example is

counsel's argument that 28 U.S.C. § 636(b)(1)(A) requires a district court to reconsider a magistrate judge's order despite the statute's plain statement that a district judge "may reconsider" such an order (emphasis added).

In addition, defendants present compelling arguments for sanctions. For instance, defendant ATU notes that "to this day" it "has no idea what it is alleged to have done." Similarly, the named defendants claim they were never given proper notice of the specific actions they allegedly took to deprive plaintiff of his constitutional rights.[13] In their joint answer, defendants maintain that if an appeal of sanctions "is itself frivolous, Rule 38 gives

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[13] Having reviewed the pleadings, we too are puzzled over who some of the named defendants are or what role they may have played in terminating plaintiff.

appellate courts ample authority to award expenses." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 407 (1990) (a case involving Rule 11 sanctions).

Defendants are entitled to some form of compensation for having been dragged so pointlessly through the courts for the past two years. This action has been groundless from the day of filing, and the agonies visited upon the defending parties and their counsel by plaintiff's attorney and his relentless aggressiveness cannot be allowed to go unanswered. Attorneys who confuse misguided zeal and the pursuit of unfounded legal theories for championing the cause of justice must recognize there is a price for their efforts. The cause of justice is not an invitation to batter blameless parties, nor is it a substitute for proper investigation and grounding of

legal proceedings. When the lack of preparation rises to the level of marked indifference to or ignorance of the law, as it has in this case, justice demands compensation.

The judgment of the district court is AFFIRMED, and the case is remanded for a determination of reasonable attorney fees for each defendant for defending this appeal. Those fees shall be assessed against counsel for plaintiff, but not plaintiff. Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

Entered for the Court

John P. Moore
Circuit Judge